Date: July 22, 1997

Case No.: 95-INA-638

In the Matter of:

ADAM GUZICZEK,
Employer

On Behalf Of:

JAN MALEK,
Alien

Appearance: Paul W. Janaszek, Esq.,
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

**Statement of the Case**

On June 27, 1994, Adam Guziczek ("Employer") filed an application for labor certification to enable Jan Malek ("Alien") to fill the position of Cook Kosher (AF 6-7). The job duties for the position are:

> Prepare, season and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are four years of high school and two years of experience in the job offered.

The CO issued a Notice of Findings on March 24, 1995 (AF 24-26). The CO proposed to deny labor certification because the Employer failed to show that the job opportunity constitutes permanent, full-time employment in accordance with § 656.50 (now recodified as § 656.3). The CO directed the Employer to provide evidence which clearly establishes that the position, as performed in his household, constitutes full-time employment.

Accordingly, the Employer was notified that he had until April 28, 1995, to rebut the findings or to cure the defects noted.

In his rebuttal, dated April 24, 1995 (AF 27-34), the Employer stated that the Cook will be required to cook meals for himself, his wife, and their four children, as well as his mother and father. The Employer further stated that his mother previously performed the cooking duties, but is not able to continue doing so. He provided a typical schedule along with estimated preparation times. In summary, the Cook will be required to cook 10 breakfasts, 66 snacks, 28 lunches, 24 afternoon meals, and 40 dinners per week. The Employer also asserted that he entertains frequently, however, and the Cook will be required to prepare extra meals as needed. The Employer stated that he does not have records to substantiate past entertainment. Finally, the Employer stated that the Cook will not be required to perform any non-cooking related duties.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on May 8, 1995 (AF 36-38), denying certification because it does not appear that the job duties, standing alone in this household, would reasonably be considered full-time employment.

On June 6, 1995, the Employer requested review of the Denial of Labor Certification (AF 44-51). On August 25, 1995, the CO forwarded the Appeal File to the Board of Alien Labor Certification Appeals ("BALCA" or "Board").

**Discussion**

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 24-25). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In rebuttal, the Employer stated that the Cook will be required to cook meals for himself, his wife, and their four children, as well as his mother and father (AF 34). The Employer further stated that his mother previously performed the cooking duties, but is not able to continue doing so (AF 33).[2] He provided a typical schedule along with estimated preparation times (AF 30-33). In summary, the Cook will be required to cook 10 breakfasts, 66 snacks, 28 lunches, 24 afternoon meals, and 40 dinners per week (AF 30). The Employer also asserted that he entertains frequently, however, and the Cook will be required to prepare extra meals as needed (AF 29).

[2] The Employer also submitted a letter from his mother stating that she had been cooking eight hours per day for her son and his family (AF 27).

The Employer stated that he does not have records to substantiate past entertainment. Finally, the Employer stated that the Cook will not be required to perform any non-cooking related duties and his mother takes care of the children after school.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. However, we are unable to make that determination at this time, as the CO has raised a new issue for the first time in the Final Determination. The Employer's rebuttal indicated that his mother will be taking care of the children from 2:30 until the parents return home. The CO, in the FD, then stated, "it appears reasonable to conclude then that the mother is currently taking care of the children in addition to cooking 'eight hours per day.' Apparently, as the Employer's mother has to divide her duties, the job opportunity does not consume a full eight hours per day." We find that the CO should have issued a second NOF to give the Employer an opportunity to respond to this new issue.

Accordingly, this matter must be remanded for the Certifying Officer to issue a new NOF and permit the Employer an opportunity to rebut.

However, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT).

**ORDER**

The Certifying Officer's denial of labor certification is hereby **REMANDED** for further action consistent with this decision.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I concur with the conclusion reached by the majority. On remand, I would direct the CO's attention, as well as Employer/Alien, to the case of *Teresita Tecson*, 94-INA-014 (May 30, 1995),

wherein it was held that a three-month requirement for experience in Filipino cooking was unduly restrictive. My research reveals no cases of "specialty" domestic cook cases decided by the Board to the contrary.

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, N.W., Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.